

DECISION



17577
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-199737

DATE: March 31, 1981

MATTER OF: Carolina Marking Devices, Inc.

DIGEST:

1. In view of sharply conflicting recollections of parties, there is doubt whether telephone conversation constituted notice to protester of initial adverse agency action. In circumstances of case, protest which was filed within 10 working days after subsequent agency letter informed protester that award had been made to another company is regarded as timely.
2. GAO sees no basis for objection to GSA's determination placing protester's rubber stamps in same category as stamps of other offerors using same raw materials, and in awarding one Federal Supply Schedule contract at lowest offered price rather than making multiple awards.

This is our decision on a protest by Carolina Marking Devices, Inc. (Carolina) concerning solicitation No. 2FC-RAB-M-A0224-S, issued by the Federal Supply Service, General Services Administration.

For the reasons discussed herein, we are denying the protest.

BACKGROUND

The ^{ING}protest concerns a negotiated procurement involving the awarding of Federal Supply Schedule contracts for several types of pre-inked rubber stamps and related items. Upon receipt of the initial proposals, GSA ascertained that several offered "Perma Stamp" products--Perma Stamp being a registered trademark of a product licensed and patented by Porelon, Inc., a division of Johnson

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Diversified. GSA determined that all of the offered Perma Stamp products were essentially the same because all use the same Porelon raw materials. Accordingly, instead of making multiple awards, GSA decided to make only one award for Perma Stamp products on the basis of the lowest net price to the Government. GSA included Carolina's product within the Perma Stamp category notwithstanding Carolina's protest that it should be evaluated separately. Carolina received an award for one type of stamp because its offer for that type was the lowest-priced among the Perma Stamp offerors. Carolina did not receive awards for several other items because it was not lowest-priced among the Perma Stamp offerors, and it protested to our Office.

TIMELINESS

GSA has strongly urged that the protest is untimely because--contrary to section 20.2(a) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1980)--it was not filed within 10 working days after initial adverse agency action on a protest Carolina had filed with GSA. In this regard, GSA has cited a memorandum of a telephone conversation between one of its officials and the protester's counsel which took place 15 working days prior to the filing of the protest at our Office. The record indicates that the parties' recollections of the telephone conversation are sharply conflicting. The GSA official's contemporaneous memorandum is unequivocal in stating that Carolina's counsel was told of a GSA conclusion that Carolina's stamps were substantially similar to the stamps offered by other offerors and that award would be made based on lowest net price. Counsel, on the other hand, has emphatically asserted that the conversation was but one phase of a process of continuous negotiations between GSA and the protester, that he was not told in the conversation that GSA's decision was final, and that the protester relied in good faith on statements by the GSA official and a GSA attorney that GSA's final position would be furnished in writing. Subsequent to the telephone conversation, a letter from the contracting officer (which did not refer to the prior telephone conversation) advised the protester that GSA did not agree with its contentions and that an award had been made. The protest to our Office was filed fewer than 10 working days later.

Considering all the foregoing circumstances, we believe that on the present record there is at least some degree of doubt whether the protester received notice of initial adverse agency action in the telephone conversation, and that in the circumstances the protest should be considered to have been timely filed.

PROTESTER'S POSITION

While Carolina has raised a number of different contentions, we believe its protest basically involves three principal arguments. First, the protester contends that although it uses Porelon raw materials, its product is not essentially the same as the stamps offered by other Porelon licensees. In this regard, Carolina has asserted that its stamps have a number of unique features such as a patented mount, dust covers, and an adjustable pressure feature, and has noted that its best and final offer was submitted in its own tradename, "Caromark". The protester believes that it was patently unfair for GSA to group its product with the products of other Porelon licensees merely because all use the same raw material in their products.

Second, the protester maintains that the responsible GSA officials failed to comply with the provisions of a GSA document entitled FSS Procurement Letter No. 299, dated April 24, 1980. Among other things, this document states that effective immediately FSS procuring activities were to substitute a "single award net price concept" in place of multiple awards in circumstances where (1) identical products were offered by two or more suppliers and (2) similar products with essentially the same characteristics, capabilities and capacities were offered by one or more suppliers. Further, it provided that in the case of similar products, necessary analysis and research was to be conducted to determine if a single award could be made. The letter also stated that the Schedules Manager was to decide whether to cancel the multiple award solicitation and carry out future procurements on a single award basis, or to proceed with awards under the multiple award solicitation "with subsequent cancellation when competitive procurement documentation is ready."

In essence, Carolina argues that the responsible GSA officials never conducted the research and analysis contemplated by Procurement Letter No. 299, and also that they acted without authority in making single awards for each type of stamp being procured rather than canceling the solicitation or proceeding with the multiple awards under the solicitation.

Third, Carolina maintains that GSA erred in selecting Rubber Stamps, Inc., as the offeror to be used as the benchmark pricing criterion for custom stamps, because FSS Procurement Letter No. 144 states that the offeror selected should be one which sells to the Government in significant volume, and Rubber Stamps does not.

AGENCY'S POSITION

Initially, GSA points out that contrary to the protester's understanding, the determination to make a single award on the basis of lowest net price for Perma Stamp products was made pursuant to FSS Procurement Letter No. 240, August 5, 1977, not FSS Procurement Letter No. 299. Specifically, the agency points to provisions in Procurement Letter No. 240 to the effect that where different products have the same manufacturer's label, or are found to be identical despite different labeling, only one contract should be entered into for such items. GSA notes that the sample stamps submitted under the protester's Caromark tradename were clearly labeled "Perma Stamp". Further, the agency points out that in any event its actions complied with Procurement Letter No. 299 as well. GSA maintains that cancellation of the solicitation would have been inappropriate because only nine of the 23 proposals offered Perma Stamp items, and that there was nothing objectionable in changing from a multiple award to a single award procedure for Perma Stamp products. Further, the agency denies that the protester was treated unfairly, noting that every effort was made to consider Carolina's contentions, including extensive research and examination of samples of Carolina's stamps. Finally, GSA points out that even if it had proceeded with multiple awards, the protester would not have received awards for the two items in question (custom stamps and daters) because its prices were not considered favorable.

PROTESTER'S REBUTTAL

In response to the contracting agency's report, Carolina has repeated its allegation that GSA failed to comply with the requirements of Procurement Letter No. 299. Further, the protester has pointed to an inconsistency in the GSA report, in that some GSA documents state that the various offered Perma Stamp products were determined to be "identical", whereas others indicate that such stamps were not found to be identical, only "essentially the same."

DISCUSSION

To a large degree, Carolina's protest appears to be premised on the idea that once GSA issued a solicitation allowing multiple awards, it was grossly unfair for the agency to change its approach and decide that only a single award would be made for identical or essentially similar products, because this created chaos and uncertainty for the offerors.

In this regard, we would note initially that there is nothing unusual about a contracting agency amending a request for proposals after initial proposals have been received. For example, where a substantial change occurs in the Government's requirements during negotiations, Federal Procurement Regulations § 1-3.805-1(d) requires the Government to issue a written amendment to the RFP. See also Techniarts, B-189246, August 31, 1977, 77-2 CPD 167, where the contracting agency changed the RFP evaluation criteria after initial proposals were received and properly amended the RFP to reflect the changes. Here, GSA did not formally amend the solicitation, but did, in requesting best and final offers, notify all offerors by letter that only a single award would be made for Perma Stamp products. Such notification was sufficient to place offerors on notice of the change in the award criteria. The Ohio State University Research Foundation, B-190530, January 11, 1979, 79-1 CPD 15.

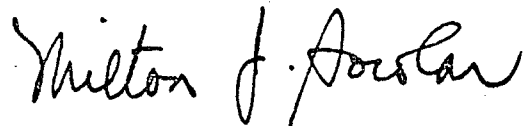
Further, we do not read FSS Procurement Letter No. 299 as limiting GSA's ability to amend the solicitation or as forcing GSA to choose between canceling the solicitation or proceeding with multiple awards. Rather, the letter simply appears to list cancellation

of the solicitation and proceeding with multiple awards as possible alternatives which the GSA Schedules Manager is to consider.

Next, we do not believe that the record fails to offer rational support for GSA's including Carolina's product along with the Perma Stamp products offered by other offerors, notwithstanding that some GSA documents refer to the products having been found to be "identical", while others state they were not identical but rather "essentially the same." FSS Procurement Letter No. 299, which the protester maintains is controlling, speaks in terms of products which have essentially the same characteristics, capabilities, and capacities. In the present case, the record indicates that GSA carefully considered samples submitted by the offerors and concluded that notwithstanding the allegedly exclusive or unique features offered by Carolina, there were no significant differences among the various Perma Stamp brands, and that all were essentially the same. We do not believe the protester has shown that this conclusion clearly lacks a reasonable basis.

Finally, since we do not find GSA's categorization of Carolina's product among the Perma Stamp offerors to be objectionable, and since Carolina's offer for the items in question was not lowest priced among this group of offerors, the issue raised by the protester as to whether the benchmark pricing criterion for custom stamps was inappropriate is academic and need not be considered.

The protest is denied.

A handwritten signature in dark ink, reading "Milton J. Fowler". The signature is fluid and cursive, with the first name "Milton" being the most prominent.

Acting Comptroller General
of the United States